19

Office - Supreme Court, U. S.
FILED
JUN 27 1953
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. 153

NORAL WILLIAMS, REBECCA YOUNG SMALLS, GERTRUDE YOUNG and LAURA YOUNG,
Petitioners,

—vs.—

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

COLEMAN GANGEL,
JOSEPH E. BRILL,
Attorneys for Petitioners,
165 Broadway,
New York, N. Y.

THE ALBERT PRESS — TRIANGLE 5-1058-1059

INDEX.

PAGE

Opinions Below 2

Jurisdiction 2

Questions Presented 2

Statute and Rule Involved 3

Statement 3

Specification of Error 4

Reasons for Granting the Writ 4

Argument 6-13

POINT I. Guilty Knowledge Amounting To Bad Motive Is Essential Element Of Crime Charged 6

A. Failure to aver in the indictment scienter or fraud was a palpable failure to charge a crime 6

B. Implication cannot supply an omission of the essential elements of a statutory crime 8

POINT II. Failure To Allege The Essential Elements Of The Statutory Crime Rendered The Indictment Fatally Defective So That It Could Not Be Redeemed By A Waiver 9

Conclusion 13

CITATIONS.

Asgill v. U. S., 60 F. 2d 780, 784 8

Berger v. U. S., 295 U. S. 78, 82 12

Bookbinder v. U. S., 287 Fed. 790 11

Brenner v. U. S., 287 F. 2d 636 8

Crank v. U. S., 61 F. 2d 620 ..... 8, 11, 12

Dunbar v. U. S., 156 U. S. 185, 192 11

Evans v. U. S., 153 U. S. 584 ..... 5, 8, 10

Fontana v. U. S., 262 Fed. 283 12

Hagner v. U. S., 285 U. S. 427 ..... 5, 8

PAGE

Hardesty v. U. S., 168 Fed. 25, 27 10
Harris v. U. S., 104 F. 2d 41, 43 ..... 5, 8, 10
Hartson v. U. S., 14 F. 2d 561 12
Horn v. U. S., 182 Fed. 721, 728 11
Keck v. U. S., 172 U. S. 434 12
Mones v. U. S., 267 Fed. 317, 320 8
Morgan v. Devine, 237 U. S. 632, 641 12
Oesting v. U. S., 234 Fed. 304, 306 10
Pettibone v. U. S., 148 U. S. 197 ..... 8, 12
Robertson v. U. S., 168 F. 2d 294 8
Schafer v. U. S., 179 F. 2d 929 5
Sherman v. U. S., 268 Fed. 516 12
Sutton v. U. S., 157 F. 2d 661 10
U. S. of A. v. Charles E. Mueller and Earl Majors, 178 F. 2d 583 ..... 5, 6, 7
U. S. v. Chesbrough, 176 Fed. 778, 784-5 ..... 7, 8
U. S. v. Grady, 185 F. 2d 273 13
U. S. v. Hess, 124 U. S. 483 10
U. S. v. Max, 156 F. 2d 13 8
U. S. v. Rosenberg, 195 F. 2d 583 10
U. S. v. Slenker, 32 Fed. 691 8
U. S. v. Winnicki, 151 F. 2d 56 8
Wishart v. U. S., 29 F. 2d 106, 107 ..... 7, 11, 12

STATUTES AND RULES.

Rule 12(b)(2) and (3) Federal Rules of Criminal Procedure 2, 3, 4, 9
Rule 12, Federal Rules of Criminal Procedure 10
Rule 34, Rules of Criminal Procedure 10
Title 18 U. S. C. 545 ..... 2, 3, 4, 6, 7, 11, 12
Title 18 U. S. C. 556 10
Title 26 U. S. C. 2593(a) 7, 11, 12
Title 26 U. S. C. 3234(b) 7, 12
Title 28 U. S. C. 1254(1) 2

MISCELLANEOUS.

Notes of Advisory Committee, Rule 12 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. .....

NORAL WILLIAMS, REBECCA YOUNG SMALLS, GERTRUDE YOUNG and LAURA YOUNG,
Petitioners,

—vs.—

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

TO THE HONORABLE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATED JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioners, Noral Williams, Rebecca Young Smalls, Gertrude Young and Laura Young, pray that a Writ of Certiorari issue to the United States Court of Appeals for the Fifth Circuit to review a judgment of that court entered in a certain cause pending in said Court styled United States of America, Appellant, vs. Noral Williams, Rebecca Young Smalls, Gertrude Young and Laura Young, Appellees, number 14166 on the docket of said Court; wherein petitioners' motion for rehearing, timely filed, was finally passed upon by the said United States Court of Appeals, and overruled, and final judgment entered on the 30th day of April, A. D., 1953.

Opinions Below.

The opinion of the United States Court of Appeals for the Fifth Circuit on original submission is reported in 202 F. 2d 712. The opinion of the Court of Appeals on the motion for rehearing is reported in 203 F. 2d 572.

Jurisdiction.

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

The opinion of the United States Court of Appeals is dated March 26th, 1953, and judgment thereon duly entered. A motion for rehearing, timely filed, in accordance with applicable rules of said Court of Appeals, was passed on by the Court and overruled on April 30th, 1953.

Questions Presented.

1. Whether the indictment returned against the petitioners was fatally defective, as to substance, in charging an offense under Title 18 U. S. Code, Sec. 545, in that it failed to allege specifically, as an essential element of the statutory offense, that they *fraudulently* and *knowingly* facilitated the transportation, received and concealed certain merchandise which they knew had been imported, contrary to law.

2. Whether the failure to expressly allege an essential element of the offense charged can be supplied by implication.

3. Whether the failure to expressly aver an essential and prescribed element of the statutory offense charged could be and was waived by the petitioners under Rule 12(b)(2) and (3) of the Federal Rules of Criminal Procedure in presenting objection thereto initially after verdict.

4. Whether failure of the indictment to plead the essential statutory elements of the offense by failing to charge that the proscribed acts were committed knowingly and fraudulently was cured by the verdict.

Statute and Rule Involved.

United States Code Title 18, Sec. 545; Federal Rules of Criminal Procedure Rule 12(b)(2) and (3).

Statement.

The petitioners were charged jointly in a 3-count indictment returned in the United States District Court for the Western District of Texas on December 17, 1951, with violation of Section 545 of Title 18 U. S. C. (2, 3). They were acquitted after trial upon instructions of the Court, on May 22, 1952 on the first count. A conviction was returned by the jury on the second and third counts (4, 5).

The counts upon which petitioners were convicted charged in essence that they facilitated the transportation of certain merchandise which they knew had been imported into the United States contrary to law, and that they received and concealed the same. Neither count expressly alleged that they "fraudulently or knowingly" transported, received or concealed the merchandise.

Petitioners filed a motion in arrest of judgment, after the verdict, predicated upon the asserted basic premise that the indictment failed to charge a crime and substantially was fatally defective in failing to allege, as part of the offense charged, that they had knowingly and fraudulently transported, received and concealed the merchandise which they knew had been imported into the country contrary to law (6, 7). The District Court granted the motion, quashed the second and third counts of the indictment and dismissed the case on June 11, 1952 (10).

Upon the Government's appeal to the United States Court of Appeals, Fifth Circuit, the judgment of dismissal was reversed, and the cause remanded to the Trial Court for further proceedings not inconsistent with the opinion of the Court of Appeals (21-23). Petitioners' motion for rehearing was overruled by the Court of Appeals on April 30, 1953 (30-31).

The Court of Appeals based its reversal of the judgment of dismissal by the United States District Court, substantially upon the asserted grounds that (a) though knowledge and fraud were not expressly averred in the indictment, they were necessarily implied; (b) even if the indictment be fatally defective in its failure to expressly charge scienter or fraud, such defect was waived by petitioners in raising the objections for the first time after trial; (c) that the verdict cured such defects; (d) possession of the goods, unexplained, authorized conviction for violation of the section.

Specification of Errors.

The Court of Appeals erred:

1. In holding that the indictment was not fatally defective by reason of the omission therefrom of an allegation that the proscribed acts were committed knowingly and fraudulently and further that such omission could be inferred and implied.

2. In holding that by virtue of Rule 12(b)(2) and (3) of the Federal Rules of Criminal Procedure petitioners waived the defect even if the indictment were fatally defective for failure to directly assert scienter or fraud.

3. In failing to rule that the indictment did not charge a crime under Title 18 U. S. Code Sec. 545.

Reasons for Granting the Writ.

1. Petitioners were denied the requisite of a fair trial by due process of law, in that they were not confronted with an indictment expressly charging an offense within the Statute under which they were indicted. This is so by reason of the failure to charge in the indictment all of the essential elements of the offense including scienter or fraud.

2. The rights of petitioners were seriously prejudiced in that the Court of Appeals held, in effect, that the failure of the indictment to aver an essential element of the statutory offense charged, was waived under Rule 12(b)(2) and (3) of the Federal Rules of Criminal Procedure, because the objection was not made timely.

3. A denial of due process, with resulting prejudice to petitioners, has occurred because (a) the Court below has sanctioned the validity of a conviction found upon an indictment which did not put in issue all of the essential elements of the crime sought to be charged, (b) the accused are denied the right to measure the conviction against a future defense of ~~total~~ double jeopardy.

4. The decision of the Court of Appeals in the case at bar is in direct conflict with its own decision in *U. S. of A.* v. *Charles E. Mueller and Earl Majors,* 178 F. 2d 593. It is also at variance with *Harris* v. *U. S.,* 104 F. 2d 41, 43, decided by the Eighth Circuit, and runs counter to the decisions of the U. S. Supreme Court, as stated in *Evans* v. *U. S.,* 153 U. S. 584; *Hagner* v. *U. S.,* 285 U. S. 427.

5. There is a conflict in decisions dealing with the questions involved among the Fifth, Ninth and Eighth Circuits, as disclosed by *U. S.* v. *Mueller* (5th Circuit) *supra, Harris* v. *U. S.* (8th Circuit) *supra,* and *Schafer* v. *U. S.* (9th Circuit), 179 F. 2d 929.

ARGUMENT.

POINT I.

GUILTY KNOWLEDGE AMOUNTING TO BAD MOTIVE IS ESSENTIAL ELEMENT OF CRIME CHARGED.

A. Failure to aver in the indictment scienter or fraud was a palpable failure to charge a crime.

The Statute upon which the second and third counts were asserted (18 U. S. C. 545) reveals a clear and unquestioned condemnation of acts therein proscribed, knowingly and fraudulently committed.

The Court of Appeals recognized that the indictment contained no express allegation of intent, motive or scienter and that the knowledge or fraud was an essential element of the crime charged (24).

The precise question confronted the U. S. Court of Appeals for the Fifth Circuit in the case of *U. S. A.* v. *Charles E. Mueller and Earl Majors,* 178 F. 2d 593. The indictment in that case charged violation of Title 19 U. S. C. A. Sec. 1593(b) (now Title 18 U. S. C. Sec. 545), in that the defendants there facilitated the transportation of lottery tickets which they knew had been brought into the United States illegally. The Court of Appeals stated at page 594:

> "Even if it be conceded that appellant could base its prosecution on 19 U. S. C. A. sec. 1593(b), its appeal must fail because the indictment does not allege bad motive on the part of the defendants. It simply alleges that the appellees jointly and severally facilitated the transportation of lottery tickets, knowing that they had been brought into the United States contrary to law. This is not enough to include every essential element of the offense; it should have been alleged the appellees knowingly and fraudulently facilitated the transportation of such tickets. The

gravamen of the offense under Section 1593(b) is bad motive in facilitating the transportation of lottery tickets, coupled with the knowledge of prior unlawful importation. Ordinarily, an allegation that an act is unlawfully, wilfully or knowingly done imparts not only knowledge of the thing done but also an evil intent or bad purpose. The omission of both words, fraudulently and knowingly, was a fatal defect in the indictment."

The words knowingly or fraudulently as used in the Statute are specified therein as alternate and distinct methods of committing the offense and are of equal and separate effectiveness. *U. S.* v. *Chesbrough,* 176 Fed. 778, 784-5. The word knowingly as used in the Statute connotes not mere awareness but guilty knowledge, bad motive and evil intent. *U. S.* v. *Mueller,* 178 F. 2d 593, 594.

Retention of the word "knowingly" by the revisers of the Statute under consideration from previous enactments persuasively demonstrates the legislative intent to treat the word as an essential and distinct element of the crime, and not as mere surplusage or attributing simple awareness. *Cf.* Reviser's note 18 U. S. C. 545 pp. 560, 561. It is noteworthy that the criminal statutes relating to traffic in Marihuana stamps it as a crime to unlawfully possess or transport the drug, without regard to knowledge, intent or bad motive of the defendant, 26 U. S. C. 2593(a), 3234(b).

There is then the inescapable conclusion that "guilty knowledge" as involving bad motive, is an essential and vital element of the crime charged against the petitioners here. It follows that an omission from the indictment which effected a failure to allege that the prohibited acts were knowingly or fraudulently committed, that is with bad or illegal motive, intent or purpose, stamps the indictment as fatally defective for failure to charge an offense. *U. S.* v. *Mueller,* 178 F. 2d 593; *Wishart* v. *U. S.,* 29 F. 2d 106, 107;

U. S. v. *Chesbrough,* 176 Fed. 778; *Evans* v. *U. S.,* 153 U. S. 584; *Pettibone* v. *U. S.,* 148 U. S. 197.

The rule is well established that where scienter, intent or knowledge is a prescribed element of a crime, failure to plead such statutory elements of the crime is tantamount to failure to charge a crime. *Crank* v. *U. S.,* 61 F. 2d 620; *U. S.* v. *Max,* 156 F. 2d 13; *U. S.* v. *Slenker,* 32 Fed. 691; *U. S.* v. *Winnicki,* 151 F. 2d 56; *Mones* v. *U. S.,* 267 Fed. 317, 320. This Court has stated in *U. S.* v. *Evans,* 153 U. S. 584, in substance that the test of the sufficiency of an indictment is whether an indictment charges the crime alleged to have been committed with precision and certainty, and whether every ingredient of which the crime is composed is accurately and clearly alleged.

In the case of *Hagner* v. *United States,* 285 U. S. 427, 431, this Court specifies the test of the sufficiency of an indictment as being the following:

> "The true test of the sufficiency of an indictment is not whether it could have been made more definite and certain but whether it contains the elements of the offense intended to be charged, and sufficiently apprises the defendant of what he must be prepared to meet, and, in case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction."

B. Implication cannot supply an omission of the essential elements of a statutory crime.

The reported authorities uniformly hold that the essential elements of a statutory offense must be expressly averred. An attempt to supply the omission by inference or implication fails to comply with the minimum requirements. *Robertson* v. *U. S.,* 168 F. 2d 294; *Brenner* v. *U. S.,* 287 F. 2d 636; *Harris* v. *U. S.,* 104 F. 2d 41; *Asgill* v. *U. S.,* 60 F. 2d 780, 784; *Pettibone* v. *U. S.,* 148 U. S. 197.

POINT II.

FAILURE TO ALLEGE THE ESSENTIAL ELEMENTS OF THE STATUTORY CRIME RENDERED THE INDICTMENT FATALLY DEFECTIVE SO THAT IT COULD NOT BE REDEEMED BY A WAIVER.

The Court of Appeals appears to give recognition to the omission from the indictment of essential elements of the crime charged, but it nevertheless endeavors to infuse validity into the pleading by charging an alleged waiver at the behest of petitioners, and rests for authority for such conclusion on Rule 12(b)(2) and (3) of the Federal Rules of Criminal Procedure (21). It further asserts, in effect, that in any event the verdict cured the defect (22).

The position is untenable under the reported authorities. It is extremely prejudicial to petitioners' right to due process.

The indictment having failed to expressly charge the requisite elements of the crime, it is probable that the jury proceeded to convict on the assumption that these elements, i.e., guilty knowledge, bad motive and intent, were not and need not have been proven as part of the offense, resulting in a conviction upon proof of only part of the crime. The petitioners here are confronted with the anomalous result of conviction resting on the dual structures of only part of the Statutory offense on one with inference or implication and waiver on the other.

It is patently clear that Rule 12 classifies into one group all defenses and objections which must be raised by motion, "* * * other than lack of jurisdiction or failure to charge an offense," upon penalty of waiver for failure to do so. In the other group are embraced defenses and objections which may be raised by the defendant, at his option by motion or at any time during the action, without fear of waiver. Cf. Notes of Advisory Committee on Rule 12. Notes to subdivision (b) (1) and (2) of Rule 12, page 206, Title 18 U. S. C. A.

The case at bar falls squarely within the latter group. It is among the group concerning which Rule 12(b)(2), *supra*, expressly provides that "* * * failure of the indictment or information to charge an offense shall be noticed by the court at any time during the pendency of the proceeding." The courts have consistently sustained this rule. *Harris* v. *U. S.* (C. C. A. 1939), 104 F. 2d 41; *Hardesty* v. *U. S.* (C. C. A. 6th 1909), 168 Fed. 25, 27; *Oesting* v. *U. S.* (C. C. A. 9th 1916), 234 Fed. 304, 306.

In *Harris* v. *U. S.*, *supra*, it is pertinently stated that

> "* * * where the challenge to the indictment is based upon an omission in the averments thereof of an essential element of crime, objection thereto is not waived. (Berry v. U. S., 259 Fed. 203.) It may even be asserted in this Court for the first time.
> "* * * but the essential elements of a statutory offense must be set out in the indictment. These are matters of substance, and not of form, and their omission is not aided or cured by verdict. 18 U. S. C. Sec. 556; U. S. v. Hess, 124 U. S. 483."

Rule 34 of the Rules of Criminal Procedure expressly recognizes the failure of waiver under these circumstances by providing for arrest of judgment if the indictment fails to charge an offense. *Sutton* v. *U. S.* (C. C. A. Ga. 1946), 157 F. 2d 661; *U. S.* v. *Rosenberg* (C. A. N. Y. 1952), 195 F. 2d 583.

Nor did the verdict cure the basic defect in the indictment, as the Court of Appeals concluded (3). Since scienter, fraud or intent were not put in issue by its pleadings, these basic elements of the crime were absent from consideration of the case, as there was no issue pertaining to them. It is entirely conceivable that the jury acted on the indictment, defective as it was, even though the petitioners acted inadvertently, innocently or erroneously.

It is clear that the law provides no remedy to cure the essential omission of the indictment. *Dunbar* v. *U. S.*, 156 U. S. 185, 192; *Horn* v. *U. S.* (C. C. A. 8th 1910), 182 Fed. 721, 728; *Wishart* v. *U. S.* (C. C. A. 8th 1928), 29 F. 2d 103, 107.

The Court of Appeals likewise erred in its conclusion that mere possession of Marihuana created a presumption of guilt under the Statute involved (22).

The petitioners were acquitted of the charge described in the count dealing with 26 U. S. C. 2593a. Presumption of guilt arising from unlawful possession applies to offenses charged under 26 U. S. C. 2593a—acquisition of the drug without paying the required tax. It has been held that "possession" was not the same as "receiving" or "concealing" under these circumstances. *Bookbinder* v. *U. S.*, 287 Fed. 790.

The reasoning of the Court of Appeals in the case at bar would erroneously effect a guilt under the Statute here involved by eliminating the essential elements prescribed therein and resting on a presumption of guilt by mere possession. Obviously no such result was contemplated by the Section under consideration. It would effect a requirement of equal proof under 26 U. S. C. 2593a (as alleged in the first count on which petitioners were found not guilty) and as alleged under 18 U. S. C. 545, upon which they were convicted under counts 2 and 3. Further, it would relieve the Government of its burden of proving beyond a reasonable doubt the essential elements of the crime charged.

There can be no escape from the fundamental requirement that in order to state an offense under 18 U. S. C. 545, the indictment must charge the accuser with having (1) fraudulently or knowingly, (2) facilitated the transportation (count 2) or received and concealed (count 3) merchandise, (3) imported into the United States, (4) knowing the same to have been imported contrary to law. See *Crank* v. *U. S.* (C. C. A. 9th 1932), 61 F. 2d 620.

It would appear plain that in order to prove petitioners' guilt, the Government must carry its burden to prove beyond a reasonable doubt all of the elements of the crime including knowledge (bad motive) or fraud. *Hartson* v. *U. S.* (C. C. A. N. Y. 1926), 14 F. 2d 561; *Sherman* v. *U. S.* (C. C. A. 5th 1920), 268 Fed. 516; *Keck* v. *U. S.*, 172 U. S. 434.

The result flowing from the decision of the Court of Appeals in the case at bar would peculiarly and surely impinge upon the fundamental rights of the accused and expose them to double jeopardy. It would be impossible to determine the crime of which the accused have been convicted. It would violate the established need of certainty in charging an offense. *Morgan* v. *Devine*, 237 U. S. 632, 641.

The accepted rule is that an indictment must set forth every element of the crime charged with certainty and clarity necessary to apprise the accused of the crime for which he must answer. *Crank* v. *U. S.*, *supra*; *Pettibone* v. *U. S.*, *supra*; *Fontana* v. *U. S.*, 262 Fed. 283. The purpose of this rule is not alone to enable the accused to prepare his defense, but equally important, is the need for certainty and definiteness to preserve the right to a plea of former jeopardy. *Berger* v. *U. S.*, 295 U. S. 78, 82. Concededly, the precise words "fraudulently" or "knowingly" need not be used, but to avoid fatal defect of the indictment, a fair equivalent of these words must be found within its context. *Wishart* v. *U. S.*, *supra*.

It is difficult to determine of which offense the petitioners were convicted, if the reasoning of the Court of Appeals were applied here. The elimination of the elements of bad motive, intent and scienter with reliance upon mere possession of illegally imported merchandise as the test of guilt under the Statute, as indicated by the Court of Appeals, would strip all need for allegation and proof of guilt beyond a reasonable doubt under the Statute (Title 18 U. S. C. Sec. 545), other than possession of smuggled goods. The same allegations and proof would serve as a basis of conviction under any of the Statutes dealing with possession such as 26 U. S. C. 2593a; 26 U. S. 3234b.

Since the omission of the allegations and consequent proof violates the fundamental rights of the accused, as we have here indicated, it could not be reasonably asserted that harmless error has occurred. *U. S.* v. *Grady,* 185 F. 2d 273. The basic denial of rights and protection of the rights of the accused as here indicated, it is respectfully submitted, persuasively calls for granting of the Writ of Certiorari.

CONCLUSION.

It is respectfully submitted that the petition for a Writ of Certiorari should be granted as prayed for.

COLEMAN GANGEL,
JOSEPH E. BRILL,
Attorneys for Petitioners.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	3
Argument	4
Conclusion	7

CITATIONS

Cases:

Arzaga v. *United States*, 189 F. 2d 256	5
Hagner v. *United States*, 285 U.S. 427	5, 6
Hopper v. *United States*, 142 F. 2d 181	6
Keys v. *United States*, 126 F. 2d 181, certiorari denied, 316 U.S. 694	6
Koa Gora v. *Territory of Hawaii*, 152 F. 2d 933, certiorari denied, 328 U.S. 862	6
Madsen v. *United States*, 165 F. 2d 507	7
Price v. *United States*, 165 U.S. 311	7
Shafer v. *United States*, 179 F. 2d 929, certiorari denied, 339 U.S. 979	5
United States v. *Amorosa*, 167 F. 2d 596	7
United States v. *Mueller*, 178 F. 2d 593	5

Statute:

18 U.S.C. 545	2, 4

In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 153

NORAL WILLIAMS, REBECCA YOUNG SMALLS, GERTRUDE YOUNG AND LAURA YOUNG, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The original opinion of the Court of Appeals (R. 20-23) is reported at 202 F. 2d 712, and the opinion denying the petition for rehearing (R. 30-31) is reported at 203 F. 2d 572.

JURISDICTION

The judgment of the Court of Appeals was entered on March 26, 1953 (R. 23), and an order denying a rehearing was entered on April 30, 1953

(R. 32). On May 27, 1953, the time for filing a petition for a writ of certiorari was extended by the Chief Justice to and including June 29, 1953 (R. 32), and the petition was filed on June 27, 1953. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTION PRESENTED

Whether—where petitioners filed neither a motion to dismiss the indictment nor a bill of particulars but attacked the indictment for the first time by a motion in arrest of judgment—the indictment sufficiently apprised the petitioners of all the elements of the crimes charged.

STATUTE INVOLVED

18 U.S.C. 545 provides in pertinent part as follows:

> Whoever knowingly and willfully, with intent to defraud the United States, smuggles, or clandestinely introduces into the United States any merchandise which should have been invoiced, or makes out or passes, or attempts to pass, through the customhouse any false, forged, or fraudulent invoice, or other document or paper; or
>
> *Whoever* fraudulently or knowingly imports or brings into the United States, any merchandise contrary to law, or *receives, conceals,* buys, sells, *or in any manner facilitates the transportation, concealment, or sale of such merchandise after importation, knowing the same to have been imported or brought into the United States contrary to law*—

Shall be fined not more than $5,000 or imprisoned not more than two years, or both.

Proof of defendant's possession of such goods, unless explained to the satisfaction of the jury, shall be deemed evidence sufficient to authorize conviction for violation of this section. [Italics supplied.]

* * * * *

STATEMENT

On December 17, 1951, a three-count indictment was returned against petitioners, charging them in the first count with acquiring a quantity of marihuana in violation of 26 U.S.C. 2593(a), and in the second and third counts with facilitating the transportation of, and receiving and concealing the marihuana, knowing that it had been imported into the United States contrary to law, in violation of 18 U.S.C. 545 (R. 2-3). The petitioners made no preliminary objection to the indictment as laid, nor did they move for a bill of particulars. After trial by jury, they were found not guilty under the first count, but were convicted under counts 2 and 3 (R. 4-5).[1]

[1] The two counts of which petitioners were found guilty charge as follows: "SECOND COUNT—On or about October 5, 1951, in Bexar County, Texas, within said district and division, NORAL WILLIAMS, GERTRUDE YOUNG, LAURA YOUNG, and REBECCA YOUNG SMALLS, acting jointly and severally, facilitated the transportation of certain merchandise, to wit, one hundred forty (140) pounds of marihuana which they then knew had been imported into the United States contrary to law."

"THIRD COUNT—On or about October 5, 1951, in Bexar County, Texas, within said district and division, NORAL WILLIAMS, GERTRUDE YOUNG, LAURA YOUNG, and REBECCA YOUNG SMALLS, acting jointly and severally, received and concealed certain merchandise, to wit, one hundred forty (140) pounds of marihuana which they then knew had been imported into the United States contrary to law."

Petitioners moved in arrest of judgment as to these two counts on the ground that they failed to state offenses under 18 U.S.C. 545, and this motion was granted by the District Court (R. 10-11).

On appeal by the Government, the Court of Appeals for the Fifth Circuit reversed the judgment of dismissal and remanded the cause to the District Court for further proceedings, on the grounds that the two counts sufficiently charged the offenses in the language of the statute, and that, in any event, the alleged defects in the indictment were waived under Rules 12(b)(2) and (3), F. R. Crim. P., no objection having been timely made and no prejudice having been shown (R. 20-23, 30-31).

ARGUMENT

1. Petitioners' basic contention rests on a misconstruction of the statute, 18 U.S.C. 545. Petitioners would read that section as if it required that their receipt or concealment of the marihuana had been fraudulent or knowing. But it seems clear that the statute requires a fraudulent or knowing state of mind only in the importation of the proscribed merchandise. Thus, the section is to be read as follows:

> Whoever * * * receives, conceals * * * or in any manner facilitates the transportation, concealment, or sale of such merchandise after importation *knowing* the same to have been imported or brought into the United States contrary to law * * *. [Emphasis supplied.]

The phrase "fraudulently or knowingly" applies only to the crime defined in the first clause of the second paragraph and not to the subsequently delineated crimes which contain their own mental element. The element of scienter is the knowledge that the goods have been brought into the United States in violation of law. That is the requisite mental factor which clothes the doing of the acts described with illegality. No double state of mind is required. See *Shafer* v. *United States*, 179 F. 2d 929 (C.A. 9), certiorari denied, 339 U.S. 979, where 21 U.S.C. 174, containing practically identical language, was construed in this fashion. Cf. *Arzaga* v. *United States*, 189 F. 2d 256 (C.A. 9). It suffices to make out the offenses charged to show that a defendant received, concealed or facilitated the tranportation of marihuana which he knows has been smuggled into the United States, regardless of whether his motive in doing so is corrupt or evil.[2]

2. Even if petitioners were correct in their interpretation, their failure to object to the indictment in any way until after the jury returned its verdict, required the result reached by the court below.

There is a sharp distinction between the susceptibility of an indictment to challenge before and after a verdict has been returned. *Hagner* v. *United States*, 285 U.S. 427, 433. There is no showing here

---

[2] There is of course no conflict with *United States* v. *Mueller*, 178 F. 2d 593, decided by the court below. As the court stated in this case, "the specific point here decided was not presented in the *Mueller* case or necessary to that decision" (R. 23).

that the court did not properly instruct the jury as to each element of the crime charged nor is there any contention made that the petitioners were prejudiced in any way by the wording of the indictment. Under such circumstances, it would seem clear that petitioners' belated attack upon the indictment must fail. *Hagner* v. *United States, supra; Koa Gora* v. *Territory of Hawaii,* 152 F. 2d 933 (C.A. 9), certiorari denied, 328 U.S. 862; *Hopper* v. *United States,* 142 F. 2d 181 (C.A. 9); *Keys* v. *United States,* 126 F. 2d 181 (C.A. 8), certiorari denied, 316 U.S. 694.

Further, the indictment did, by necessary inference, aver the requisite elements of the crime, even under petitioners' construction of the statute. The indictment alleged that petitioners received, concealed and facilitated the transportation of marihuana which they knew had been imported into the United States contrary to law. Their contention appears to be that the indictment did not allege that they "knowingly" received, concealed, or facilitated the transportation of the marihuana. But, as the court below stated (R. 22):

> The indictment described the overt acts that constituted the substantive offenses, leaving to implication only the intent, motive, or scienter, that actuated their conduct. They knew their purpose better than anyone else, and when they were informed by the indictment that they were being charged with receiving, concealing, and facilitating the transportation of, 140 pounds of marihuana, "which they then knew

had been imported into the United States contrary to law," they were necessarily informed that they were charged with knowingly doing the things mentioned.

See also *Price* v. *United States,* 165 U.S. 311; *United States* v. *Amorosa,* 167 F. 2d 596, 599 (C.A. 3); *Madsen* v. *United States,* 165 F. 2d 507, 509-510 (C.A. 10). In these circumstances petitioners' contention, that there was a fatal defect in the indictment which requires a dismissal of the indictment after the jury returned its verdict of guilty, is without merit.

CONCLUSION

For the foregoing reasons we respectfully submit that the petition for a writ of certiorari should be denied.

ROBERT L. STERN,
Acting Solicitor General.
WARREN OLNEY III,
Assistant Attorney General.
BEATRICE ROSENBERG,
CARL H. IMLAY,
Attorneys.

AUGUST 1953.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1953 264944 118

Office - Supreme Court, U. S.
FILED
AUG 31 1953
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 153

NORAL WILLIAMS, REBECCA YOUNG SMALLS, GERTRUDE YOUNG and LAURA YOUNG,
Petitioners,

—v.—

UNITED STATES OF AMERICA.

REPLY BRIEF.

COLEMAN GANGEL,
JOSEPH E. BRILL,
Attorneys for Petitioners.

THE ALPERT PRESS — TRIANGLE 5-1058-1059

INDEX

PAGE

Statement 1

Summary of Argument 2

POINT I —Bad motive, as evidenced by knowledge, is a required element of the crime sought to be charged 3

POINT II —An indictment which omits an essential element of a crime charged, cannot be cured by implication or waiver 5

POINT III—Petitioners have emphatically urged prejudice by the wording of the indictment 6

CONCLUSION 7

CITATIONS.

Crank v. U. S., 61 F. 2d 620 5
Enrique Rivera v. U. S., 57 F. 2d 816, 822 4
Harris v. U. S., 104 F. 2d 41 5
Price v. U. S., 165 U. S. 311 6
Shafer v. U. S., 179 F. 2d 929 ..... 4, 5
U. S. v. Amorasa, 167 F. 2d 596 6
U. S. v. Mueller, 178 F. 2d 583 ..... 2, 3, 4

STATUTES.

18 U. S. C. Sec. 545 3
18 U. S. C. Sec. 556 2
19 U. S. C. Sec. 1593(b) 3

INDEX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 153

NORAL WILLIAMS, REBECCA YOUNG SMALLS, GERTRUDE YOUNG and LAURA YOUNG,

Petitioners,

—v.—

UNITED STATES OF AMERICA.

REPLY BRIEF.

Statement.

The basis of opposition to the petition for the writ is, in essence, that

1. The Statute upon which the indictment rests does not require, as elements of the crime charged, that the proscribed acts be fraudulently or knowingly committed, hence omission of such elements from the indictment are of no consequence.

2. Even if petitioners' version of the Statute be accepted, that is, that the Statute requires fraudulent or knowing commission of the acts of receiving, concealing or facilitating transportation of merchandise imported contrary to law, nevertheless, challenge of the indictment on the ground that such elements of the crime have not been expressly averred, has been forever barred because of petitioners' failure to do so before a verdict was returned.

Summary of Argument in Reply.

The opposition fails to substantially controvert the persuasive and compelling reasons for granting the petition for the writ because

A. The decision of the Court below, in the case at bar, reveals that the Court there recognized that the Statute upon which the indictment was returned, requires as elements of the crimes charged, a bad motive or intent, that is, that the offense of facilitating the transportation, receiving or concealing the merchandise which defendants knew to have been illegally imported, were fraudulently or knowingly committed. The same decision reveals that the Court below reversed the District Court's dismissal of the indictment, however, on the ground that such elements of the crime were supplied to the indictment by implication. The same Court, in *U. S.* v. *Mueller,* 178 Fed. 2d 583, in crystal clear language removed from any possibility of dispute, held that under the Statute in question, "fraudulently or knowingly" were essential elements of the crime of facilitating the transportation, receiving or concealing of merchandise known to have been imported contrary to law.

B. It is a settled and accepted principle of law, so firmly established as to be beyond serious contention, that where an essential element of a crime is not expressly charged in the indictment, Sec. 556 of 18 U. S. C. does not apply, and that an indictment may be challenged for such omission at any stage of the proceedings.

C. Compelling reasons for granting the writ are pointed up by the brief of the opposition which highlights a serious question as to the interpretation of the Federal Statute under consideration here. This

is so, particularly, where petitioners contend, as here, that they have been seriously prejudiced by conviction under an indictment which charged but part of a crime, and the jury, which returned the conviction was precluded from passing on the essential issues as to whether the defendants are guilty of bad motive, i.e., knowledge or illegal intent in transporting, receiving or concealing the merchandise imported contrary to law.

POINT I.

BAD MOTIVE, AS EVIDENCED BY KNOWLEDGE, IS A REQUIRED ELEMENT OF THE CRIME SOUGHT TO BE CHARGED.

The opposition would deny the petition because, it urges, petitioners read the Statute (18 U. S. C. 545) incorrectly. They argue that though the words "fraudulently or knowingly" under the Statute apply to the offense of importing merchandise contrary to law, these words do not apply to the remainder of the same sentence of the same second paragraph of the Statute. We submit that this construction is in direct opposition to the decision of the U. S. Court of Appeals of the 5th Circuit, which, in the case at bar, recognized that the offenses of facilitating transportation, concealing or receiving merchandise imported contrary to law, must be committed fraudulently or knowingly. The Court stated, in effect, that while the indictment does not expressly allege fraud or knowledge in doing the things charged therein, the allegations of the indictment furnish an implication of such knowledge (Record, p. 20).

The same Court, in *U. S.* v. *Mueller, et al.,* 178 Fed. 2d 583, in dealing with a statute containing the identical language, 19 U. S. C., Sec. 1593(b), the predecessor of the Statute under consideration here, stated in crystal clear words, and in language which is indisputable, that unless the

indictment charges that defendants knowingly or fraudulently facilitated the transportation, concealed or received the merchandise which the defendants knew was imported contrary to law, the indictment is fatally defective. The Court there, with significant appositiveness, held that the gravamen of the offense is bad motive in facilitating the transportation of the merchandise, *coupled* with the knowledge of prior unlawful importation.

It is true that the U. S. Court of Appeals, 9th Circuit, in *Shafer* v. *U. S.*, 179 Fed. 2d 929, in passing on a Statute containing similar language to the one here under discussion, interpreted the same in a manner inconsistent with that of the 5th Circuit (*U. S.* v. *Mueller, supra*), and with that urged here by the petitioners. The Court in the *Shafer* case, *supra,* held in effect that although bad motive must be proven as an element of the offense charged, express allegation thereof in the indictment was unnecessary.

This decision by the 5th Circuit, and the contention of the opposition are inconsistent with an interpretation of a similarly worded Statute by the U. S. Court of Appeals for the 1st Circuit, as indicated in *Enrique Rivera* v. *U. S.*, 57 Fed. 2d 816, 822.

In the *Rivera* case, *supra,* the Court stated:

> "The next question is whether or not there was any evidence in the case from which the jury could justifiably find that the defendant *knew that they were facilitating the transportation* of foreign liquors imported or brought into the Island contrary to law." (Emphasis supplied.)

The contention of the opposition would require that the Statute be read so as to effect proof of the offense, though defendants did not know that they were facilitating the transportation of, received or concealed the goods which they knew had been imported contrary to law. They would effect a

distortion of the meaning of the Statute so that knowledge that the goods were imported contrary to law would equal knowledge of a wrongful transportation, receiving or concealing—two distinct separate and conceivably unrelated matters.

POINT II.

AN INDICTMENT WHICH OMITS AN ESSENTIAL ELEMENT OF A CRIME CHARGED, CANNOT BE CURED BY IMPLICATION OR WAIVER.

The Court below having recognized that knowledge or bad motive in receiving, concealing or facilitating transportation of goods illegally imported, are necessary elements of the offense, attempts to supply these essential elements of the crime by asserting that they may be implied, or that the omission may be cured on the ground of waiver by untimely challenge of the indictment.

It is beyond serious dispute that allegations of all of the essential elements of an offense charged must be expressly averred in the indictment. *Harris* v. *U. S.*, 104 Fed. 2d 41.

It has been repeatedly and consistently held by the Courts that an indictment, which omits essential elements of a crime charged, cannot be saved by implication or inference, and that Sec. 556 of Title 18 U. S. C. is inapplicable in such circumstances. *Crank* v. *U. S.*, 61 Fed. 2d 620.

The holding in *Shafer* v. *U. S.*, *supra* to the effect that though bad motive is an element of the crime which must be proven, even though not pleaded, adds no strength to the opposition here, in the light of the inflexible rule that all essential elements of a crime must be expressly pleaded in an indictment.

Petitioners do not, of course, contend that the precise statutory words "fraudulently or knowingly" are a prerequisite to validity of the indictment, but they do assert

that words of similar import or effect must be alleged as essential elements. Though there is, in the indictment under consideration, an allegation that defendants knew the merchandise had been imported contrary to law, there are no charges that they facilitated the transportation thereof, received or concealed the same knowingly or with bad or illegal motive. To illustrate—it is certain that if one of the defendants were driving a car in which the others were passengers who were transporting the tainted merchandise, the driver would not be guilty of knowingly facilitating the transportation, if he had not known that one of his passengers had possession of the goods in a pocket, even if the driver knew the goods had been imported contrary to law.

The cases cited by the opposition, such as *Price* v. *U. S.*, 165 U. S. 311, and *U. S.* v. *Amorasa,* 167 F. 2d, 596, are irrelevant for they deal with pleadings which contained the words "knowingly or fraudulently" or words of similar connotation or allegations of facts from which knowledge of the elements of the offense could be established.

POINT III.

PETITIONERS HAVE EMPHATICALLY URGED PREJUDICE BY THE WORDING OF THE INDICTMENT.

The opposition incorrectly points to an absence of any contention of prejudice to petitioners (Brief for Opp., p. 6).

The facts are to the contrary. Petitioners have urged prejudice to them because; they were denied a fair trial resulting in conviction on the indictment, which did not expressly charge an offense under the Statute (Pet., p. 4); defendants were convicted on an indictment which failed to put in issue before the jury all of the essential elements of the crime charged (Pet. p. 5); the conviction was based on an indictment which required the same proof, i.e., mere pos-

session of the goods which they knew were illegally imported as do other statutes, with a consequence that the defense of double jeopardy has been lost to the petitioners in possible subsequent proceedings (Pet. p. 12).

CONCLUSION.

It is respectfully submitted that the petition should be granted.

COLEMAN GANGEL,
JOSEPH E. BRILL,
Attorneys for Petitioners.